No. 260

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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1949

JAMES SHEPPARD POTTS and ADAM EMPIE POTTS,

PETITIONERS,

vs.

J. K. RADER, as administrator, et al.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF AND APPENDIX IN SUPPORT THEREOF

JAMES SHEPPARD POTTS,
ADAM EMPIE POTTS,
Petitioners.

ALEXANDER H. SANDS,
Counsel for Petitioners,
American Building,
Richmond, Virginia.

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Consecutive Topical Outline

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Abbreviations: (R. . . .) refers to page numbers in the printed record in this cause in the Supreme Court of the United States; (T. . . .) refers to page numbers in the typewritten transcript and (ST. . . .) to supplemental transcript of record sent up by the Jefferson Chancery Court to the Supreme Court of Arkansas.

SUPREME COURT
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OCTOBER TERM, 1949

JAMES SHEPPARD POTTS and ADAM EMPIE POTTS,

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vs.

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RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

May it Please the Court:

The petitioners, James Sheppard Potts and Adam Empie Potts, hereby pray that a writ of *certioarai* issue to review the judgments of the Supreme Court of Arkansas ordered to be entered in the above cause on

April 18, 1949 (Record 183-184), motion for re-hearing being denied May 16, 1949 (Record 194), and this petition is being filed in the Supreme Court of the United States prior to August 14, 1949.

Opinion Below

The opinion of the Supreme Court of Arkansas is reported in 219 S. W. (2) 769 (Advance Sheets No. 4, May 31, 1949).

Jurisdiction

The judgments of the Supreme Court of Arkansas, as stated, were ordered to be entered on April 18, 1949, and petition for re-hearing was denied by that Court on May 16, 1949.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Acts of February 13, 1925 and January 31, 1928; Tit. 28 FCA, Sec. 344.

Questions Presented

(a) The abuse of the trial court's discretion in denying the petitioner, Adam Empie Potts (Colonal U. S. Army) in the litigation involved, the protection to which he was entitled under the Soldiers' and Sailors' Civil Relief Act, 1940, §§ 1 et seq. 201 (50 USCA Appendix §§ 501 et seq. 521), and in refusal of such Court to stay proceedings under said Act, and holding that petitioner's application for relief was made solely for the purpose of delay. The action of the trial court in both particulars having been affirmed by the Supreme Court of the State of Arkansas in the opinion now sought to be reviewed.

(b) In the refusal of the trial court to recognize established canons of real estate law prevailing in the State

of Arkansas which recognize the devolution of ancestral estates, and in authorizing the sale of real estate susceptible of partition, and in entertaining partition of the premises involved before determination as to conflicts in title of such real estate.

(c) That the judgment of the court complained of in denying the petitioner Adam Empie Potts a stay in the proceedings involved, to which he was clearly entitled under the provisions of the Soldiers' and Sailors' Civil Relief Act, *supra*, constituted a denial of due process and equal protection of the law as guaranteed to him under the Constitution of the United States of America, as claimed and relied upon by this petitioner (R. 194).

STATEMENT OF THE CASE

In 1870 James Sheppard, the grandfather of your petitioners, a resident of Henrico County, Virginia, died testate, seized and possessed of a valuable tract of land on the Arkansas River, in Jefferson County, Arkansas, this cotton plantation then and now known and described as "Sheppard Island", consisting of approximately 1,875 Acres. The record, page 49, shows that, under an order entered by the Chancellor of the Chancery Court of Jefferson County, dated June 30, 1944, Chris L. Wright was appointed by the Court to make a complete examination and survey of the Sheppard Island Plantation, and in pursuance of the direction, a report was made in accordance with the direction given, which is found in the transcript commencing at page 50, the report having been filed on July 13, 1946. Special reference is made on this report, which among other things shows that at the time of the inquiry there was located upon the plantation some seventeen (17) dwellings, or tenants' houses (R. 50, 67-68). The report further shows that the prop-

erty in question had been listed on the tax books and taxes thereon paid since the time of the death of the ancestor in 1870 in the name of his estate (R. 54). Thus the alleged "deed" relied upon by the respondents was ignored by the tax authorities.

It appears from the will of the common ancestor involved, James Sheppard (R. 133-135), that he desired his executors therein named, being two in number, to sell the Arkansas property "as soon after my (his) death as they deem to the interest of my estate, and that the proceeds of sale be equally divided among my wife and children, my wife taking an equal share with each of my children so that her share shall be equal to the share of one of the children". The testator names Benjamin F. Richardson, as executor of all property in Arkansas, and Peter W. Grubbs, of Richmond (Va.) executor of all property in Virginia, the will providing, however, a limitation in this language:

> "My two executors are to unite and concur in the sale of my property in the State of Arkansas".

It is definitely established by the record, and in fact conceded by all parties concerned, and in the opinion of the court now sought to be reviewed (R. 184), that no deed or conveyance of any kind was made by the two executors just mentioned, nor is there any contention made by any party claiming interest that any conveyance of any character was made by said executors, or either of them, or any successor of such, to any stranger in title, as to the land involved.

On the 22nd day of December, 1876, for and in consideration of the sum of ten dollars ($10.00) paid by James Sheppard's widow and four children, namely, "Annie E. Shep*herd*, A. Empy Shep*herd*, Belle G. Shep-

herd, Katie E. Shep*herd*, Jr., and Katie E. Shep*herd*, Sr.", an *ex parte* quit-claim "deed" (R. 137) was "executed" to said parties by B. F. Richardson, acting alone as "Executor of Est. of James Shep*herd*, dec'd". That said quit-claim "deed" carried title in fee to the parties named therein was the contention of those strangers who denied to your Petitioners and their brother, as an ancestral inheritance, the title to the property concerned. The Court will observe that the opinion of the learned judge of the Supreme Court of Arkansas does not follow nor sustain such contention of said strangers (the Appellees) but, to the contrary, rests upon the ground of equitable estoppel (R. 185) the denial of Petitioners' absolute title to the property herein concerned; and this, though there is nothing in the record to show nor to justify such estoppel, even if legal title to real estate under any circumstances could pass through equitable estoppel.

Hence, it appears obvious that this is a case in which the Appellees (respondents herein) are attempting to partition, and to sell for their own benefit, valuable lands in which they have no interest and to which they have no title.

It was and is the contention of the three grandsons of James Sheppard (the Petitioners and their brother, Joseph Schoolfield Potts, Jr.) that, in the first place, there never has been any actual change in the fee simple title of the Sheppard Island Plantation subsequent to the decease of their ancestor, James Sheppard, in 1870; that, upon decease of their uncle "Empie Sheppard" (A. E. Sheppard), in November 1934, under the recognized doctrine of Ancestral Estates, as such rule or canon of law always has been recognized and followed as statute law in the state of Arkansas, this property then passed

to the class comprising the three children of Mrs. Isabelle Sheppard Potts (sister of said Empie Sheppard) and to A. B. Guigon, Jr. (only child of Kate Sheppard Guigon); that said A. B. Guigon, Jr., departed this life in October 1936, intestate as to this property, which then vested solely in aforesaid three Potts brothers.

But even if this position of your Petitioners could be questioned, they certainly had a right to demand an adjudication by the court as to the question presented to the court, before the chancellor could proceed either to partition or to sell the Estate herein concerned; the presumption being in favor of the heirs at law, and the burden of proof being upon the strangers claiming interest in such ancestral property. In the present instance, such adjudication was denied by the Supreme Court of Arkansas (*Potts* v. *Rader*, 219 S. W. 2d, 769-770).

REVIEW OF PLEADINGS

On October 20, 1937, a group of strangers claiming through alleged "wills" of A. E. Sheppard (son of said James Sheppard) and A. B. Guigon, Jr. (a grandson), both deceased, unmarried and without issue, brought suit in the Jefferson County Chancery Court in Arkansas, for "partition" of this land. The style of said suit was "Lisa Guigon and J. K. Rader, as administrator *de bonis non cum testamenta annexo* of the Estate of Adam Empie Sheppard, deceased, and Norman L. Flippen as administrator *cum testamenta annexo* of the Estate of A. B. Guigon, Jr., deceased, Plaintiffs, v. James Sheppard Potts, Adam Empie Potts, Joseph Schoolfield Potts, Jr., Sheltering Arms Hospital of Richmond, Virginia, Virginia Home for Incurables and Protestant Episcopal Church Home for Old Women, Defendants" (R. 1).

Adam Empie Potts and James Sheppard Potts filed their separate answers to said complaint, on November 17 and 18, 1937 (R. 5-12), denying the claims of the plaintiffs and claiming the entire property for themselves and their brother, Joseph Schoolfield Potts, Jr., as the only surviving descendants and lawful heirs of their grandfather, James Sheppard, (A. B. Guigon, Jr., then being deceased).

For several years thereafter, the stranger plaintiffs and the "charities" mentioned fought among themselves, changed their positions frequently, each manoeuvering to get as large a share as possible from said property of James Sheppard (R. 33-37). Said stranger plaintiffs (now respondents to this petition) carried their internecine strife to the Supreme Court of Arkansas (to which suit the petitioners herein were not parties) through which Court it finally was settled *among themselves*, by decree on mandate, dated October 10, 1941 (R. 40). This ex parte litigation, consuming some two years, terminated just before "Pearl Harbor". Surely, this delay can not be charged against the Petitioners. Then the stranger plaintiffs again joined forces to take for themselves two-thirds of the ancestral property of the descendants and heirs of James Sheppard.

The record shows that this delay, from October 1937 to receipt of mandate in case of *Sheltering Arms* v. *Shimberger* (201 Ark. 780, 146 S. W. (2) 921), on Oct. 10, 1941 (R. 40), and subsequent delays were brought about by the then plaintiffs themselves, to serve their own personal interest; that James Sheppard Potts and Joseph Schoolfield Potts, Jr., gave testimony by deposition on April 20, 1942 (R. 141-145); that the then plaintiffs (now respondents) took their depositions on October 9, 1942 (R. 145); that on June 17, 1943 (R. 47), motion for stay of action under Soldiers and Sailors Civil Relief

Act of 1940, was denied by the trial court to Colonel Adam Empie Potts, though it was shown that he was a necessary witness, who at all times had been on active duty with the armed forces, in preparation and in actual combat duty during and after the Jap raid on Pearl Harbor on December 7, 1941. (The war records show that Colonel Adam Empie Potts and his command at Schoofield Barracks were credited with the first Jap plane shot down at Pearl Harbor.) The Court again denied his motion for stay under said Act on September 7, 1943. (R. 48).

As one of its reasons for denying the first motion for stay of action, the trial court states "that the lands are susceptible of partition, having regard both to quality and quantity" (R. 47) and that "no prejudice can or will result". Yet the court is shown subsequently to have ordered a sale of the property, on motion of the herein respondents (R. 112-127).

On June 30, 1944 (R. 49), the court ordered a capable engineer to make a detailed survey of said Sheppard Island Plantation, ostensibly for the purpose of "partition", at a cost of $2,000.00 or more. This survey definitely showed that the lands were readily susceptible of partition, into thirds or ninths, or into any size parcels which might be found necessary in partitioning same. The report was filed July 13, 1946 (R. 51-88).

On September 2, 1947, the court entered a decree for partition in kind and appointed three Commissioners for said purpose. (R. 88-110). Seven days later the court set aside this order and directed the sale of the property in its entirety (R. 112).

On October 3, 1947, Colonel Adam Empie Potts again filed motion to vacate decree and order of sale and to stay action. (R. 114-116).

He again urges, for the third time, that his military service impairs his ability to be present or to make proper defense and to represent his interests properly; he follows this up on October 24, 1947, by filing notice, publishing to any and all prospective bidders that he would claim his rights under the Soldiers and Sailors Civil Relief Act (R. 119).

The record shows that various exceptions and motions filed (R. 113-118) and testimony taken (R. 146-158), important in their scope and nature, were not considered by the Supreme Court of Arkansas, because the trial court had ignored, disregarded, the Supreme Court's repeated writs of certioarai to supply the record of such testimony and because the trial court had delayed sending up this portion of the transcript of record; although the Supreme Court of Arkansas had received this and all parts of the record and had the entire record before it for six months before the cause came on to be considered and heard in that court.

This testimony was vitally important, as it shows necessity for stay of action under the Soldiers and Sailors Civil Relief Act, to enable Colonel Adam Empie Potts to protect not only his own interests but through his testimony and records to protect the interests of his brothers also. Further, from testimony of the Commissioners appointed by the trial court to partition the property in kind, said Commissioners "were not particularly trying to divide the land" (R. 154—lines 15-17)—that they had set a totally inadequate price of $46,500.00 (R. 153) upon this land which admittedly was producing "over $30,000 a year" (R. 155); admittedly 270 bales (about 600 pounds each) at 35 cents a pound (R. 155), which will approximate more nearly $60,000—that it might be sold to a purchaser of their own choice at this previously

agreed totally inadequate price! The Supreme Court of Arkansas refused to admit and to consider this and other very important and very necessary testimony showing the fraud being perpetrated upon this petitioner and his brothers—and, in the final analysis, a fraud upon the general public.

It is a matter of record (R. 127-128) that an attempted "sale" of said Sheppard Island property was held on February 16, 1948, that one Hamilton McNeill (R. 131) was the only bidder and at the *previously agreed* inadequate price of $46,500! (R. 131). Petitioner filed written exceptions to order of sale and to any sale or attempted sale of said Sheppard Island Plantation (R. 132).

After the hearings, on October 24, 1947, this petitioner ordered from the Jefferson Chancery Court, in Jefferson County, Arkansas, a transcript of the *complete record* in said cause, to perfect an appeal to the Supreme Court of Arkansas, said appeal having been granted in the decree entered herein by the trial court. Thereafter, this petitioner made repeated efforts to secure said complete transcript of record, receiving repeated promises but no transcript. Finally, on February 25, 1948 (R. 159), petitioners applied to the Supreme Court of Arkansas and a writ of certiorari was issued ordering the "full, true and complete transcript of the record and proceedings" to be sent up *within the prescribed time.* Other writs followed; and, after considerable delay, a portion of the record was furnished. Other writs followed for the diminution, which to suit the convenience of the lower court, arrived on or about October 18, 1948, with the misstatement that it had been withheld on Appellant's order (R. 163). (It is inconceivable that an appellant would order withheld the very portion of the record

most vitally important to his cause, embracing testimony taken especially for use in his appeal—and particularly when he had had issued numerous writs of certiorari to bring up this very evidence in full, true and complete.

In the meantime, the appellees (respondents herein) had filed a motion with the Supreme Court of Arkansas to dismiss the cause (R. 169); but, on October 18, 1948, said Supreme Court entered a *per curiam* order stating that the cause would be heard in its entirety, after all the pleadings had been filed (R. 182). This order is highly important when considered with the subsequent action of the Arkansas Supreme Court in disregarding, under its Rule Five (R. 185), the testimony and evidence in the transcript of record which had been brought up on said Supreme Court's own writs of certiorari (R. 159, 161, 162, 166) and which record, therefore, actually was before said Court, by its own action.

Upon entry of said *per curiam* order by the Arkansas Supreme Court, petitioners (appellants) immediately prepared an extensive abstract of the record (as required by the Arkansas Supreme Court and supporting briefs and had them printed and filed in the Supreme Court of Arkansas within the time provided by statute and in full compliance with the rules of that court. The appellees, who all along had access to the entire original record failed to file their answer brief within the prescribed time nor for some three months thereafter.

ERRORS RELIED ON

1. The Supreme Court of Arkansas erred in denying Appellants a trial on the merits of their cause, thereby denying to said Appellants their inherent right to due process and equal protection of the law, as guaranteed them by the Constitution of the State of Arkansas and

by the Fourteenth Amendment to the Constitution of the United States of America (R. 190).

2. The Supreme Court of Arkansas erred in denying to Colonel Adam Empie Potts his rights under the Soldiers and Sailors Civil Relief Act of 1940, as enacted by the Congress of the United States, made and provided in and for such cases, thereby denying him his inherent rights of due process and equal protection of the law, as guaranteed him by the Constitution of the State of Arkansas and by the Constitution of the United States of America.

3. The Supreme Court of Arkansas erred in assuming that "The record justifies the conclusion that the appeal to the Federal statute is made for the purpose of delay". (R. 186). When the entire record shows exactly to the contrary, by testimony that is not contradicted (R. 141, 143, 145, 147).

4. The Supreme Court of Arkansas erred in assuming that Colonel Adam Empie Potts was represented by "local counsel of unquestioned ability" in the lower court (R. 187), when, on the contrary, the record shows that Colonel Potts filed his own pleadings, was *not* represented by counsel (R. 143), and that his brother's local counsel, as a matter of accommodation, had filed motions for Colonel Potts to protect his interests by stay of action under the Soldiers and Sailors Civil Relief Act and had acted for him in this one capacity for the purpose of a stay of action only; said local counsel having filed no pleadings as to the merits of the case and having taken no steps other than for said stay of action, to which Colonel Potts is lawfully and rightfully entitled.

5. The Supreme Court of Arkansas erred in assuming in its opinion (R. 186) that Colonel Adam Empie Potts

depended on his brother to defend his title to the property herein concerned, when there is nothing in the record to support such an assumption and the entire record shows that Colonel Potts has made every effort for a stay of action under the Soldiers and Sailors Civil Relief Act (R. 47-48) to enable him to attend personally and to defend his own disputed title to this property inherited direct from his grandfather, James Sheppard.

6. The Supreme Court of Arkansas errer in affirming the decree entered by the Jefferson Chancery Court in this cause, when there was nothing in the record to support said decree.

7. The Supreme Court of Arkansas erred in rendering a decision contrary to established law and decisions of the State of Arkansas and contrary to the rights and interests of the lawful heirs and owners of the property concerned in this cause.

8. The Supreme Court of Arkansas erred in assuming in its opinion (R. 185) that the lawful heirs may be defeated and divested of their inherent rights and lawful inheritance, through acceptance, laches and acquiescence (as if such were possible), when, on the contrary, Appellants have prosecuted their claims vigorously ever since this ancestral property vested in them upon decease of all the previous class in being (those who were living, in being, at the time when the will of James Sheppard was executed).

9. The Supreme Court of Arkansas erred in assuming that title to real estate may be passed by equitable estoppel, in absence of a valid conveyance (R. 185).

10. The Supreme Court of Arkansas erred in assuming this cause to be "a simple partition suit" (R. 186), when the entire record shows that appellants are claiming full

ownership for the heirs-at-law of James Sheppard and that this entire cause is based upon that contention, the disputed title being the principal issue in this whole matter (R. 5-6).

11. The Supreme Court of Arkansas erred in assuming in its opinion (R. 185) that Appellants claim inheritance from their Grandfather James Sheppard "under their Mother's will", when the record throughout (R. 2; 170) shows that their Mother, Mrs. Isabelle Sheppard Potts, departed this life *intestate*, that she *left no will*; and said court erred in assuming that she and her mother and sisters and brother had a fee simple title in said Sheppard Island Property by virtue of any alleged "deed" the validity of which never has been established; and said court erred in assuming that Appellants claim "part of the land in reliance upon the deed and at the same time claim the rest upon the theory of its invalidity", when there is nothing in the record to support such a decision but that the entire record shows Appellants charge that the "deed" attempted by B. F. Richardson is and always has been null and void.

12. The Jefferson Chancery Court and the Supreme Court of Arkansas erred in that the Jefferson Chancery Court entered a decree and order for partition and sale of a valuable Plantation ("at a previously agreed inadequate price"—R. 112, 128, 131, 132), without trial on the merits of the cause, and the Supreme Court of Arkansas affirmed that decree, with no evidence to sustain that Appellees have any interest in the real estate concerned in the cause nor title to any part of said property.

13. The Supreme Court of Arkansas erred in affirming a decree (R. 183-187) for sale of lands when the title is in dispute and which dispute as to title never has been

brought to trial on the merits of the cause and which never has been passed upon by the trial court on the merits.

14. The Supreme Court of Arkansas erred in affirming a decree for sale of lands for partition when such lands had been proven capable of partition in kind (as recently held by said Supreme Court of Arkansas in *Sheltering Arms Hospital* v. *Shimberger*, 146 S. W. 2d, 921; 201 Ark. 780 (which decision has been cited by the respondents).

15. The Supreme Court of Arkansas erred in refusing to consider the full, true and complete transcript of the record and proceedings in this cause, brought up on its own writs of certiorari, over which only said court had control.

16. The Supreme Court of Arkansas erred in entertaining or considering Appellees' motion to dismiss under Rule Five, as lateness of delivery of the transcript was due to the trial court's own failure to comply with the several writs of certiorari issued to it by said Supreme Court and to the failure of said Supreme Court of Arkansas to enforce its own commands issued to the Jefferson Chancery Court, over which Appellants had no control.

17. The Supreme Court of Arkansas erred in affirming the decree of the Jefferson Chancery Court, on Appellees' motion to dismiss under Rule Five, on mere statement of Appellees' counsel and without evidence to support it. (R. 169-182).

18. The Supreme Court of Arkansas erred in its failure to consider the cause of Appellants, who had filed a respectful and creditable brief, well within the lawful

and proper time for filing after receiving transcript of the record.

19. The Supreme Court of Arkansas erred in not rejecting, on the court's own motion, the answer brief of Appellees, which said answer brief was filed herein *three months later than the time prescribed by law*; the Appellees, by their own line of reasoning, "toying" with the court; and especially as said answer brief of Appellees did not confine itself to the issues of the case nor to the issues of law nor of fact and truth, it did not answer Appellants' brief but was intemperate in tone, vituperative and gratuitously scurrilous and insulting, filled with misleading generalities and misstatements and unreason (as also was Appellees' motion to dismiss under Rule Five). (R. 169-182).

20. The Supreme Court of Arkansas erred in sustaining Appellees' motion to strike the evidence which would not sustain the decree of the lower court, and in "assuming" that such evidence "supported the chancellor's action" (R. 185).

21. The Supreme Court of Arkansas erred in taking the position that the burden is on the recognized heirs-at-law to prove their claims to ownership of inherited ancestral real property and that the presumption of ownership favors strangers attempting to divest such heirs-at-law of such property inheritance.

22. The Supreme Court of Arkansas erred in misquoting citations of Virginia cases of Appellants (R. 187), when the holding of the Virginia Supreme Court was exactly to the contrary (that there was no evidence to show an intention to delay).

23. The Supreme Court of Arkansas erred in that none of the authorities cited in its opinion in this cause (R.

184-187) are in point with the case or have any bearing upon it and have no place in it.

24. The Supreme Court of Arkansas erred by its failure to consider the merits of this cause concerning ancestral property of James Sheppard, which has remained in his name and in possession of his lineal heirs continuously, the possession not having changed in nearly a hundred years; and for failure of said court to dismiss Appellees' case, upon its own motion, and for its failure to reverse the decree of the Jefferson Chancery Court and to remand this cause for trial on the merits or with appropriate direction.

25. The Supreme Court of Arkansas erred in rendering a decision the opinion in which shows it to be based upon assumptions only (R. 183-187), which assumptions are entirely foreign and irrelevant to the record and true facts of the case and completely contrary to the law and the evidence.

REASONS RELIED UPON FOR ALLOWANCE OF THIS WRIT

1. It is the contention of petitioners that they and their brother are the sole owners of Sheppard Island Plantation, in Jefferson County, Arkansas, by direct descent from their grandfather, James Sheppard, and that the "deed" by which one executor attempted to convey this property was unlawful and has been void from its very inception; therefore, in depriving these petitioners and their brother of their property, the Arkansas courts are violating the Constitution and laws of Arkansas and thereby are violating the due process and equal protection provisions of Article Fourteen of the Constitution of the United States of America.

2. Denial of stay of action to Colonel Adam Empie

Potts, under the Soldiers and Sailors Civil Relief Act was to deny him and his brothers their inherent right to due process of law and equal rights and equal protection under the law, guaranteed by Article Fourteen of the Constitution of the United States of America.

3. The Supreme Court of Arkansas, by its arbitrary refusal and failure to consider pertinent portions of the testimony, on the basis or pretext of such not being a part of the record, when such was under the control and in the possession of that Court as a consequence of its own writs of certiorari (R. 159, 161, 162, 166), shows prejudice and error on the part of the Court.

4. Sheppard Island Plantation is the ancestral heritage of the petitioners and their brother and as such is sacred to them, having belonged to their family for approximately a hundred years; and, as shown by the record, it has a minimum monetary value of $46,500 (R. 112, 128, 132).

5. In this cause the decision of the Supreme Court of Arkansas appears to have violated the statutes and the Constitution of the State of Arkansas as well as having violated the Statutes and Constitution of our United States of America; it appears arbitrary and prejudiced, which this petitioner believes the Honorable Supreme Court of the United States will discover upon a proper review of said cause, to the end that it will see fit to reverse said decision of the Supreme Court of Arkansas and to remand this said cause with appropriate direction.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of the Supreme Court of the United States, directed to the Supreme Court of Arkansas, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named, a full and com-

plete transcript of the record and all proceedings in the cause entitled on its docket as *James Sheppard Potts et al* v. *J. K. Rader, Administrator, etc., et al,* and that the decree of the Jefferson Chancery Court, of Jefferson County, Arkansas, heretofore affirmed by the Supreme Court of Arkansas, may be reviewed and reversed by this Honorable Court, and that these petitioners and their brother may have such other and further and general relief in the premises as shall be meet and just and in accord with Equity and Good Conscience; and this your petitioners prayeth and ever will pray.

JAMES SHEPPARD POTTS,

ADAM EMPIE POTTS,

Petitioners.

August 10, 1949.

ALEXANDER H. SANDS,
Counsel for Petitioners,
American Building,
Richmond, Virginia.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Supreme Court of Arkansas (R. 184) is reported in 219 S. W. (2d) 769 (advance sheets Tuesday, May 31, 1949, no. 4).

Jurisdiction

The judgment of the Supreme Court of Arkansas here sought to be reviewed was ordered to be entered in the case of *James Sheppard Potts, et al,* Appellants, v. *J. K. Rader, et al,* Appellees, therein pending and numerically designated as No. 8553, on the 18th day of April, A. D. 1949 (R. 183), and a petition for rehearing was denied by said Court on May 16, 1949 (R. 194). The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925; United States Code Anotated, Section 344.

The Questions Presented, Statutes Involved, Specification of Errors and Statement of Case

A statement of the questions presented, the statutes involved, the specifications of error to be urged and statement of the case involved will be found in the foregoing petition.

ARGUMENT

For the convenience of the Court, we set out at this point the full West Publishing Co. headnotes in the case before the Supreme Court of Arkansas as they appear in 219 S. W. (2d) page 769.

1. Executors and Administrators—

Only beneficiaries of will could complain of executors' failure to carry out testator's instructions to sell planta-

tion and divide proceeds equally among testator's widow and children by conveying property directly to widow and children, and no complaint thereof could be made where testator's whole family had accepted executors' deed and recognized its validity for over 60 years.

2. Estoppel—

Defendants could not claim title to part of land in reliance upon executors' deed and at same time claim the rest upon theory of invalidity of the deed.

3. Partition—

The rule that a court of equity should not entertain partition suit when title to land is in dispute was not applicable where there was another clear ground of equitable jurisdiction.

4. Equity—

Where defendants in partition suit invoked aid of equity by joining in plaintiffs' request for appointment of a receiver, defendants could not thereafter question equitable jurisdiction.

5. Appeal and Error—

Where transcript of testimony on question of whether chancellor should have ordered division in kind instead of partition by sale was not filed in Supreme Court until long after time allowed by Supreme Court rule, motion to strike such testimony from record would be sustained, and without such testimony, Supreme Court would assume that evidence supported chancellor's action. Rules of the Supreme court, rule 5.

6. Army and Navy—

Application for a stay under Soldiers' and Sailors' Civil Relief Act is addressed to trial court's discretion.

Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 201, 50 U. S. C. A. Appendix, §§ 501 et seq., 521.

7. Army and Navy—

Refusal of motion of one of defendants in partition suit to stay proceedings under Soldiers' and Sailors' Civil Relief Act was not abuse of discretion, where there was no showing that such defendant's military service had impaired his ability to defend, and record justified conclusion that appeal to federal statute was made solely for purpose of delay. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 201, 50 U. S. C. A. Appendix, §§ 501 et seq., 521.

QUESTIONS PRESENTED

While we consider that the several questions presented in the assignment of errors relied on, set out in our petition, are all important, the outstanding question so far as our appeal to this Court is concerned obviously rests upon the action of the Supreme Court of Arkansas in holding that the appellant, Adam Empie Potts, was not entitled to relief, on the record reviewed, under the Soldiers and Sailors Civil Relief Act. The opinion of the Court carries the consideration of this question as the final question to be considered (R. 185-186).

The action of the Court in each instance, in considering the rights of the petitioner under the Soldiers and Sailors Relief Act, bases such upon what was said by this Court in its majority opinion in the case of *Boone* v. *Lightner*, 319 U. S. 561. We are filing as an appendix or addendum to this brief a brief filed by counsel for the petitioner before the Supreme Court of Arkansas, which we hope the Court will consider, so far as applicable, as a part of this brief. But whether it be disposed

to do so or not, it seems to us that the question, last considered by the Supreme Court of Arkansas, stands at the very threshhold of all questions affecting the rights of your petitioners in this case. Clearly, if the state court erred in its holding in respect to the relief sought by this litigant, the case should be reviewed and reversed, and should be sent back to the lower court that complete relief may be granted to your petitioners without delay.

It is our position, for the reasons assigned in our petition, that, clearly, the Supreme Court of Arkansas erred in this major question, however reviewed; but the Court certainly erred in the narrow construction placed by it upon this important war relief act, in holding that the appeal to the federal statute so made by Colonel Potts was made for the purpose of delay, as was held in the *Boone* case, *supra.*

Concerning the second observation, it is submitted with confidence that there is no justification in the record in this case for the gratuitous insult made by the Court against this litigant. The assumption of such position by the learned Court, in the absence of the evidence to justify the language, found together with sundry mistakes of fact found in the opinion: such, for instance, where it states that a deed mentioned had been recognized as valid by the whole family for over sixty years, an assumption without foundation or support; or again, that "throughout this litigation both appellants have asserted an interest in the property under their mother's will", where the mother died intestate, (as shown by the record) and left no will; the position taken by the learned judge, that the appellants had invoked "the aid of equity by joining the plaintiff's request for the appointment of a receiver" that such thereby lost his right to question the jurisdiction of the Court (the record in this instance

showing that the appointment of a receiver in the early stages of litigation pertains to only the question of rents and profits, etc.); and the inaccurate statement found in the concluding paragraph of the opinion to the effect that the Supreme Court of Virginia had, in other litigation, held that the petitioners had been guilty of intentionally delaying such proceedings (171 Va. 52). It is submitted that such circumstances and expressions just related reflect a degree of carelessness on the part of the Supreme Court of Arkansas which should be considered by this Court when accepting or rejecting such findings in material matters.

From a realistic standpoint, on what possible ground could the petitioners herein have desired a delay in this cause at any stage, insofar as their inherent rights were concerned? They were concerned, and naturally and properly concerned, when an effort was being made on the part of contending litigants, for their own convenience, to hasten or retard litigation; or by such to hasten the sale of property, ancestral in its nature and long in the petitioner's family, at a time when, owing to war conditions, the orderly and deliberate progress of litigation could not proceed in a normal way; and particularly, when one of the litigants was actively engaged in military service, who as such was entitled to the protection afforded under the statute involved.

In respect to the second observation, namely, that the construction of the Court of the Soldiers and Sailors Relief Act was narrow, we maintain that the statute was applicable to any stage of any proceeding. The most important stage of the litigation in the instant case was that involved when the Court assumed to change its position in respect to partition, and to authorize a sale of the property. Such action on the part of the Court bringing

into the picture rights of other parties, which necessarily jeopardized or burdened the standing of such petitioners, who were then entitled to the provisions of this munificent statute.

In conclusion, it is submitted that it is desirable if not necessary, in the interest of the public as well as these litigants, that the case of *Boone* v. *Lightner* again should be brought under review by this Honorable Court. It is a remarkable circumstance that this case, which so often has been considered and construed by state courts, as we are advised, so far never has been reconsidered by this Honorable Court. The most recent reference being that found in the opinion of *Fontaine Lee Maistre* v. *Herman Leffers*, 33 U. S. 1-6, where the Court said, (reported in 92 L. Ed. 433):

> "But as we indicated on another occasion, the Act must be read with an eye friendly to those who drop their affairs for answer to their country's call. *Boone* v. *Lightner*, 319 U. S. 561-575. 87 L. Ed. 1587-1595, 63 S. Ct. 1223."

It is submitted with confidence that if the record in the instant case is so reviewed, your petitioner, Adam Empie Potts, was entitled to the protection afforded him by this statute but denied to him by the Supreme Court of Arkansas in the instant case. We submit that it would serve no good purpose for us to prolong this brief by reviewing the numerous cases referring to the Boone-Lightner case. Many of these have been collected and are found in Federal Code, Annotated, Volume 11, page 1130 and 1949 Supp. page 299.

It seems difficult to reconcile the decision of the Supreme Court of Arkansas in the instant case with its previous decision in *Reynolds* v. *Haulcroft*, 205 Ark. 760, 170 S. W. (2nd) 678.

Ancestral Property in Arkansas

On the question of ancestral property in the state of Arkansas, we bring to the attention of the Court the following statute, namely Arkansas Statute 1947, Bobbs-Merrill 1948, Volume 5, Subject, Descents and Distribution, and the case of *Webb* v. *Cardwell*, 1939, 128 S. W. (2d) 691, 122 A. L. R. 814 and note.

Lapsed Legacies

In the case under consideration, Richardson, the Arkansas executor, and Grubbs, the Virginia executor, were directed to "*unite* and *concur*" in the sale of Sheppard Island and divide the proceeds among the wife and children or their descendants, in equal parts. Instead, Richardson, the Arkansas executor, on his own, quitclaimed the property to the heirs of the testator. This quitclaim is void and of no force and effect. The heirs so treated it and both executors died without selling the property; therefore, the legacy lapsed. A lapsed legacy is one which never has vested or taken effect; if an executor dies without exercising a power of appointment which is to be exercised by him alone, the legacy *lapses.* 57 Am. Jur. 955, Sec. 1424.

In *Fountain* v. *Ravenel*, 17 How. (U.S.) 369, 15 L. Ed. 80, it was held that where a will empowered the executors, or the survivor of them, to dispose of the residuary estate after the death of the testator's widow to such charitable institutions as they should deem best, the widow was named as one of the executors, and she survived the other executors and died without exercising the power, the residuary gift "lapsed" (Footnote 57 Am. Jur. 955).

Since the legacy had lapsed, due to the failure of Richardson and Grubbs, co-executors, "to unite and con-

cur" in a sale of the property and to divide the proceeds as directed in the will, and since the will does not contain a "residuary clause," the appellants respectfully submit that the intention of James Sheppard, the testator, is controlling. *Galloway* v. *Darby*, 105 Ark. 558, 151 S. W. 1014. 57 Am. Jur. 973, Sec. 1448. *Jackson* v. *Robinson*, 195 Ark. 431, 112 S. W. (2d) 417. *Witten* v. *Wegman*, 182 Ark. 62, 30 S. W. (2d) 834.

CONCLUSION

Accordingly, for the foregoing reasons, it is contended that the court below erred as herein specified and that its decision should be reviewed and reversed.

The will of James Sheppard shows his full intention that his property be *not given away* to strangers nor to be sold for strangers' benefit, and his own blood excluded.

This Appeal was taken from the Jefferson Chancery Court to the Supreme Court of Arkansas on February 25, 1948, by James Sheppard Potts and Adam Empie Potts, Appellants, against J. K. Rader, as administrator *de bonis non cum testamenta annexo* of Estate of A. E. Sheppard, deceased; Norman L. Flippen, as administrator *cum testamenta annexo* of Estate of A. B. Guigon, Jr., deceased; Lisa Guigon Shimberger and John Baird Shimberger; Sheltering Arms Hospital of Richmond, Virginia; Virginia Home for Incurables and Protestant Episcopal Church Home for Old Women, of Richmond, Virginia; Joseph Schoolfield Potts, Jr., and Virginia N. Potts, Appellees.

All of these parties are residents of Richmond, Virginia, except Colonel Adam Empie Potts, whose residence is Hampton, Virginia.

Above-named appellants now are the Petitioners herein, and above-named appellees are the respondents; and

this petition is being filed after notice to all respondents and/or their counsel, and copies of this Petition, Brief and Appendix have been served and delivered to said opposing parties.

Respectfully submitted,

ALEXANDER H. SANDS,
Counsel for Petitioners.

APPENDIX

Supreme Court of Arkansas

JAMES SHEPPARD POTTS, ET AL., Appellants

v. No. 5555

J. E. RADER,
ADMINISTRATOR, ETC., ET AL., Appellees

APPEAL FROM
JEFFERSON COUNTY CHANCERY COURT
HARRY T. WOOLLDRIDGE, CHANCELLOR

SEPARATE BRIEF OF APPELLANT COLONEL ADAM EMPIE POTTS

W. H. GLOVER

CARL LANGSTON

JAMES SHEPPARD POTTS

Attorneys for Appellant

PRESCOTT PRINTING CO., LITTLE ROCK

SUPREME COURT of ARKANSAS

JAMES SHEPPARD POTTS, ET AL ..... *Appellants*

V. No. 8553

J. K. RADER,
ADMINISTRATOR, ETC., ET AL .... *Appellees*

APPEAL FROM
JEFFERSON COUNTY CHANCERY COURT
HARRY T. WOOLDRIDGE, CHANCELLOR

SEPARATE BRIEF OF APPELLANT COLONEL ADAM EMPIE POTTS

STATEMENT

Colonel Adam Empie Potts, appellant, has been on active duty with the United States Army continuously while this suit has been pending in the trial court and still is on active duty with the Army of the United States.

This suit for partition was filed October 20, 1937, by plaintiffs who had no right to partition, as later determined by the trial court. Colonel Adam Empie Potts was named a defendant along with others. On November 17, 1937, he filed his separate answer and in his answer he stated that his two brothers and himself are the only natural and lawful heirs entitled to said property or any of it, as he and his brothers are the only surviving lineal descendants, next of kin and natural and lawful heirs of said James Sheppard, deceased, and are the only natural and lawful heirs of decedent Kate Empie Sheppard (widow of said James Sheppard, deceased), Mrs. Isabelle Sheppard Potts (their mother), Mrs. Annie Sheppard Lurty (widow without issue), Kate E. Sheppard Guigon (mother of A. B. Guigon, Jr., now deceased, bachelor without issue); and Adam Empie Sheppard (bachelor decedent without issue) and, as such, that this defendant and his two brothers now should be, and are the only ones entitled to have and to hold and to own said Sheppard Island property and are the only ones in whom any right, title or interest in said property now actually is vested; and, further, that all claims of any other interest (if there be any other interest) would be contingent upon the outcome of the various suits now pending against the estates of the herein mentioned decedents and all of said actions involving disputes as to

the title to the various real estate holdings claimed by said estates.

Colonel Potts set out further in his answer that title to said property is in dispute, denied the title of the appellees, denied the legal capacity of the appellees to sue, a defect of parties, and that the complaint did not state facts sufficient to constitute a cause of action and other things, and asked that a receiver be appointed to represent the property and collect the rents. A receiver was appointed and the case remained on the docket of the court and on May 19, 1939, a motion for continuance was filed on account of the illness of James Sheppard Potts, one of the defendants (T.56) and the motion was granted (T.60). Subsequently the court found it necessary to construe and interpret certain wills in order to determine title to the property as between certain parties.

The court did construe one alleged will which was appealed to the Supreme Court of the State of Arkansas. The decree of the trial court thereon is found at page 212 of the transcript, said decree being entered on April 6, 1940. The aggrieved parties appealed to the Arkansas Supreme Court and on February 27, 1941, the mandate was filed reversing the decree and the opinion is *Sheltering Arms Hospital of Richmond, Virginia* v. *Shinberger*, 201 Ark. 780, 146 S.W.

(2d) 921. The opinion was written by Justice McHaney. In that opinion he said:

> "We think it unnecessary to a full and complete understanding of the case to set out the various pleadings of the parties, further than to say the action was instituted by Rader, the Administrator and appellee against the three named charities and certain others who did not answer and have no interest in this controversy to have the will of A. E. Sheppard construed."

In other words, as stated by Justice McHaney, these appellants, James Sheppard Potts and Colonel Adam Empie Potts had no interest in the construction of the will of their Uncle A. E. Sheppard. During this appeal to the Supreme Court, proceedings in the trial court were in abeyance and the answer filed by Colonel Adam Empie Potts was awaiting trial. When the Supreme Court handed down its decision in 1941, the United States was then involved in a global war and Colonel Adam Empie Potts was on active duty. Nevertheless the trial court proceeded to take depositions in this case and when the depositions were taken in Richmond, Virginia, on the 17th day of April, 1942, it was suggested that Colonel Adam Empie Potts, appellant, was serving with the Armed Forces at Honolulu in Hawaii and was not able to be present; and it was pointed out in the deposition, at page 258 of the transcript, that permission had not been obtained

from the trial court to take depositions in the absence of Colonel Adam Empie Potts in the military service, and the rights of Adam Empie Potts were expressly reserved. Many motions, pleadings, amendments, etc., were filed in the case, all of which were filed by parties *other than* the appellant Colonel Adam Empie Potts. However, on September 7, 1943, appellant Colonel Adam Empie Potts applied for relief under the provisions of the Acts of Congress known as the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. 501, 54 Stat. 1178, which was passed for the express purpose of relieving mental distress to soldiers and sailors occasioned by the handicap of their being in the military service. His motion to stay action is as follows:

> "1. That said defendant is now on active duty in the military service of the United States, serving as colonel in the United States Army, stationed at Camp Davis, North Carolina, as commanding officer of said camp.
>
> 2. That said defendant's military service demands his presence and attention to such extent that he has not had, does not have, and will not have during the period of said military service the time or ability to properly prepare his defense

in said case and to appear in court in defense of himself in said case.

3. That because of said defendant's military service, his records and documentary evidence are located at other points than his present station and that his military service prevents him from properly assimilating the same to be used in the preparation of his defense.

4. That said defendant's ability to properly defend himself in said case has been, is, and will be, for the duration of his military service, impaired by reason of his being in the military service of the United States as aforesaid.

Wherefore, said defendant moves the court to stay further action in said case, insofar as said defendant is concerned, for the duration of said defendant's service in the military service of the United States and for three months thereafter, as provided by the Soldiers' and Sailors' Civil Relief Act of 1940, and amendments thereto, as enacted by the Congress of the United States."

Apparently no immediate action was taken on this motion and the case lay on the docket.

However, many depositions and much proof was taken and, on May 24, 1947, a brother of appellant was informed by the attorney for the opposition that the court intended to enter a decree partitioning the property, and the brother replied that he was surprised that the Court would appear to disregard the protest made by Colonel Potts under the Soldiers' and Sailors' Relief Act (T.478). On September 2, 1947, without ruling upon Colonel Potts' motion for a stay under the Relief Act, the court decreed partition and appointed commissioners (T.457-473). The property was ordered sold—and the court still had failed to rule upon the motion of Colonel Potts for a stay. On October 3, 1947, Colonel Potts filed a motion to vacate decree and order of sale and to stay action (T.486-488), and in this motion he stated:

> "1. That said defendant is now on active duty in the military service of the United States serving as a Colonel in the United States Army and is stationed at Fort Winfield Scott in the State of California as Commanding Officer.
>
> 2. That said defendant's military service demands his presence and attention to such extent that he has not had, does not have and will not have during the period of said military service the time or

ability to properly prepare his defense in said cause or to appear in court in defense of his rights and interests involved in said cause.

3. That said defendant has been on active duty in the military service of the United States during the entire period of World War II, during much of which time he has been stationed overseas, and he will be on such active duty for a period of approximately one year from and after the filing of this motion.

4. That said defendant's records and documentary evidence are located at points far distant from his present station and at points other than the places where he has previously been stationed and that his military service has prevented and now prevents him from properly assembling the said records and evidence for use in the preparation of his defense herein.

5. That said defendant's ability to properly make defense in this cause has been, is and will be for the duration of his military service impaired by reason of his being in the military service of the United States, as aforesaid.

6. That at the time a decree was rendered in this cause on the 2nd day of

September, 1947, and at the time an order of sale was entered herein on the 9th day of September, 1947, this defendant was stationed at Fort Winfield Scott, as aforesaid, which is more than 2,000 miles from the place where this court is held and more than 3,000 miles from Richmond, Virginia, where said defendant's records and documentary evidence are located.

7. That the lands involved in this action known as the Sheppard Island Place are susceptible of partition among the persons entitled to said lands and should not be sold, but that this defendant will be prevented by his said military service from showing those facts to the court before the time fixed for said sale or during his said military service.

8. That if said lands are offered for sale during said defendant's said military service he will be prevented by such military service from attending the said sale and will be deprived of the opportunity to bid on said lands or to secure bidders who will bid for them their reasonable value.

Wherefore, said defendant moves that the court set aside and vacate its decree rendered in this cause on the 2nd day of September, 1947, and the order of sale

made by the court on the 9th day of September, 1947, directing the sale of said lands known as the Sheppard Island Place and stay further action in this cause, insofar as said defendant is concerned, for the duration of said defendant's service in the military service of the United States and for three months thereafter, as provided by the Soldiers' and Sailors' Civil Relief Act of 1940 and amendments thereto as enacted by the Congress of the United States."

A response, unverified, was filed to this latter motion stating and admitting that Colonel Potts had been in the army for ten years, and that during the war he was stationed in Virginia and North Carolina and that he could have defended the suit, that he had been represented by an able attorney and that his brother was a co-defendant, admitted that Colonel Potts was now stationed in California, but that his rights would not be prejudiced by this suit, his army service was no handicap, and that he could have obtained the records and defended if he had so desired (T.496-499). On October 24, 1947, Colonel Potts published a notice to intended bidders claiming his rights under the Relief Act (T.505). The court finally ruled upon his motion for stay on November 1, 1947, long after the court had

ordered the property partitioned and sold, and in its decree the Court said:

> "That the defendant Adam E. Potts is and has been at all times during the pendency of this action represented by counsel who has done everything necessary and proper in the defense of any and all rights of the said Adam E. Potts, and that the interests of the said Adam E. Potts would not be prejudiced in any way by permitting this action to proceed, and that the Soldiers' and Sailors' Relief Act is, therefore, in applicable to the facts of this case:"
>
> "That the exceptions to the report of the commissioners heretofore filed herein, be and the same are hereby overruled; that the motion of Colonel Adam E. Potts that this action be stayed under the Soldiers' and Sailors' Relief Act be and the same is hereby overruled; that the sale heretofore ordered be and the same is hereby vacated and set aside until the further orders of this Court."

In this same order, however, the court set aside its order of sale of the property, for the reason that one A. C. Creggett, adjoining land owner, had filed an affidavit in the office of the Circuit Clerk of Jefferson County claiming that the Creggett family were the owners of a part of the property sought to be partitioned. This order was filed November 13, 1947 (T.513). On December 6, 1947, David Knott, Charlie

Knott, and Roxie Lee Knott, his wife, intervened, and claimed that they owned a large part of the lands sought to be partitioned in this cause (T. 517); and on the same day the whole Creggett family intervened, setting up their claims to the property (T.521-523). Answers were filed to the interventions, a hearing apparently was held, and a decree on the interventions was entered January 13, 1948 (T.536). The decree was against the intervenors. On January 21, 1948, the court again ordered the property sold—sale to be held February 16, 1948—and ordered that the property not be sold for less than $46,500.00. The property allegedly was sold for exactly that figure. However, the money now is in the National Bank of Commerce at Pine Bluff, pending this appeal. The court did not approve the sale but, in effect, has asked the Supreme Court either to approve or reject the sale on appeal.

Appellant Colonel Adam Empie Potts submits that the trial court abused its discretion in refusing to give him a hearing upon his motions for stay, until after the decree of sale and the trial was complete; that it further abused its discretion in refusing to grant him a stay as provided in the Soldiers' and Sailors' Relief Acts, that he has been denied due process and equal protection of the law as guaranteed by the Constitution of the United States and of the State of Arkansas.

ARGUMENT AND BRIEF FOR APPELLANT COLONEL ADAM EMPIE POTTS

The Trial Court Erred in Refusing to Rule upon the Motion of Colonel Adam Empie Potts for a Stay of the Action

The record in this case shows upon its face that appellant, Colonel Adam Empie Potts, filed his separate answer in this law suit and defended it in good faith, made his appearances in court as long as his service in the Army of the United States would permit. The court will recall that the United States still was fighting for its very life in September of 1943, island hopping was just beginning in the Pacific and the invasion of Normandy was to begin several months later, in June of 1944; every available man was needed, the turning point of the war was just ahead, and preparation for the invasion of Normandy was a stupendous task; fighting on two fronts was straining our manpower in the Armed Forces and every available man was needed. At that time, Colonel Adam Empie Potts was Commanding Officer of one of our large army training posts, a very important post and a very responsible position indeed to the whole Nation. This law suit, in which the Colonel was one defendant, had been pending in Jefferson County

since October, 1937, and under these war conditions, he moved for a stay under the Soldiers' and Sailors' Relief Act of 1940, and properly filed his motion on September 7, 1943. This stay should have been granted for the duration of the war and three months, as Justice Holt, in *Reynolds* v. *Haulcroft*, 205 Ark. 760, 170 S.W. (2d) 678, on May 3, 1943, under war time conditions, and just three months before the Colonel filed his motion, said:

> "The purpose of such enactments is to relieve a person so engaged in military service from the mental distress occasioned by the handicap of his being in the military service, resulting in his inability to function with the freedom of action which he possessed prior to his induction into the military establishment, causing inability to meet financial and other obligations and commitments, the mental distress resulting from inability to adequately protect legal rights and interests or to make proper defense to suit brought against him, it being recognized that such distress has the tendency to impair his efficiency as a member of the militia, and, as well, the tendency to impair the efficiency of the organization with which he may be associated; the design was to 'prevent interference with military duties.' *Andrews* v. *Gardiner*, *supra* (185 App. Div. 477, 173 N.Y.S. 1).
>
> Section 521 deals with conditions under which a stay of proceedings will be

> allowed, and provides: 'At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service. Oct. 17, 1940, c 888, S. 201, 54 Stat. 1181.'
>
> In the instant case, appellant, Reynolds, has asked for a stay, and in so doing, in our opinion, has taken away from the trial court any discretion that it might have had, on its own motion, and in the absence of request for a stay by the sailor, and has made the allowance of a stay mandatory 'unless in the opinion of the court the ability.....of the defendant to conduct his defense is not materially affected by reason of his military service'."

The court further said that, upon application by the soldier, the stay was mandatory, unless, in the opinion of the court, the ability of the defendant to conduct his defense is not materially affected by reason of his military service. It held also that the burden is on the party resisting

the stay to prove by clear and convincing evidence that the rights of the soldier would not be impaired.

Chief Justice Smith concurred and agreed that the Act should be liberally construed, agreed with the result, but disagreed with language used because the "trial court is now without discretion".

Under this decision, without a doubt, appellant's application for a stay should have been granted. However, no action was taken upon the application for stay, as the transcript of the record will show. The court completely ignored the motion for a stay, took no action thereon, and proceeded as if it never had been filed.

On June 30, 1944, about the time of the Normandy invasion, the court ordered Chris L. Wright to make a survey of the property, to aid the court in determining whether or not partition could be made (T.388). The report is shown at pages 412-440 of the transcript and is detailed and lengthy, reflects long study, hard work and deliberation. The court ordered the receiver to pay Chris L. Wright the sum of $2,000.00 for his services (T.441).

In an order dated June 17, 1943, the court held: "that the lands are susceptible of partition,

having regard both to quality and quantity...." (T.381).

Mr. Wright reported that the property was subject to partition in kind and, at page 423 of the transcript, he said:

> "In the recommended partition set out below all of the three parcels are contiguous; and are further susceptible of partition in kind if this is desired at some later date by the owners."

Mr. Wright's report was filed July 13, 1946. However, the court entered its decree on September 2, 1947, decreeing partition and appointed commissioners (T.457-473). The record does not reflect that the commissioners ever took an oath. However, exactly one week from the date of their appointment, September 9, 1947, they filed their report stating that partition could not be made without great prejudice to the owners, and without giving any reasons (T.474). On the same day, September 9, 1947, the court approved the report of the commissioners—without giving these appellants time to see the report and object and offer testimony, and without regard to the application for a stay which had been filed by Colonel Potts, who was over two thousand miles away, serving his country in time of war. The court ordered the property sold on October 6, 1947 (T.476).

We contend that this action of the court is a clear abuse of discretion. Colonel Potts was two thousand miles distant, a report had been on file by a competent engineer for over a year-and-a-half to the effect that his property could be divided in kind and his part set off to him, said report costing the sum of $2,000.00, and the court had previously found that the lands were susceptible of partition, having regard both to quality and quantity. Without any notice to him, the court appointed commissioners, determined that the property could not be partitioned in kind, and ordered it sold—all of which was done within one week, without giving reasons and without giving either the plaintiffs or the defendants an opportunity to object to the report of the commissioners; and all of said action of the court was taken in complete disregard of the motion for stay filed by Colonel Potts in September of 1943, and without taking action thereon.

The appellant, Colonel Potts, learned of the action of the court, and filed a motion to vacate the decree of sale and to stay action, on October 3, 1947 (T.486). He stated that he was stationed in California as a Commanding Officer, that his ability to defend his law suit was impaired by reason of his military service, that the lands involved in the action were susceptible of division and should not be sold, but that he was prevented

by reason of his military service from showing those facts and that, if a sale were had, military service would prevent him from making an adequate bid (T.486). Under these circumstances, it was a clear abuse of discretion for the court to conduct hearings for three years, without ruling upon the application for stay which had been filed by Colonel Potts. His application for stay had been filed in 1943, and, according to the doctrine in *Reynolds* v. *Haulcroft, supra*, it was the burden of the parties resisting the stay to prove by clear and convincing evidence that the rights of the soldier would not be impaired. No party to this action had resisted Colonel Potts' application for a stay, no proof had been introduced by anybody, except by Colonel Potts' brother, and all of this testimony was to the effect that Colonel Potts could not adequately defend. Even though this application was in the files of the case and this testimony was on file with the court, still the court let it lie in the file for three years and never had said yes or no to the application for stay, but proceeded as if said application were non-existent—and had reached the point, after varied, ramified, and lengthy litigation involving boundary disputes, title disputes, and construction of wills, where it decreed the sale of the property and fixed a date for the sale. Colonel Potts then renewed his application for a stay, and moved to vacate the decree of sale, by reason of his inability to defend or to bid at the

sale and thereby to protect his rights by reason of his military service (T.486). On October 9, 1947, more than three years after Colonel Potts had filed his application for a stay, the first response to his application for a stay was filed, and this was to his renewed application that was made after the sale was ordered (T.496). What a unique response it was! It admitted that Colonel Potts had been in the army for over ten years, that he didn't expect to end his military service soon (as if it were a matter of his own volition), that he had a brother who was a defendant; that they had the same able attorney (this is not verified by the record—the record shows that the Colonel filed his own application for a stay and prepared his own answer), that the undisputed proof showed that there was no defense to be made by Colonel Potts, that Colonel Potts had ten years in which to defend and hadn't done it (we are not so sure the army would have given him a three-year leave during time of war to litigate this suit in Jefferson County, since he was Commanding Officer of a large training camp), that any proof he could offer would be merely cumulative of what already had been offered. Who, of all people, resisted the stay? The answer is: the Virginia Home for Incurables and Protestant Episcopal Church Home for Old Women and the Sheltering Arms Hospital! The court did, however, on November 1,

1947, over-rule the Colonel's application for a stay. The court ruled:

> "That the defendant Adam E. Potts is and has been at all times during the pendency of this action represented by counsel who has done everything necessary and proper in the defense of any and all rights of the said Adam E. Potts, and that the interests of the said Adam E. Potts would not be prejudiced in any way by permitting this action to proceed, and that the Soldiers' and Sailors' Relief Act is, therefore, in applicable to the facts of this case;
>
> That partition of the property involved in this action cannot be made without great prejudice to the owners, as set up in the report of the commissioners herein, and that the Court should and does hereby approve the report of the commissioners herein and finds the facts therein set forth to be true;
>
> That the exceptions to the report of the commissioners heretofore filed herein, be and the same are hereby overruled; that the motion of Colonel Adam E. Potts that *this* action be stayed under the Soldiers' and Sailors' Relief Act be and the same is hereby overruled; that the sale heretofore ordered be and the same is hereby vacated and set aside until the further orders of this Court."

Counsel for Colonel Adam E. Potts had authority only to plead for Colonel Potts the bene-

fit of the Soldiers' and Sailors' Civil Relief Act. Counsel had no other authority.

At the time of this order, all of the proceedings were over as far as the partition was concerned, except the sale; the court had held a three-year trial. If the stay had been granted to Colonel Potts, the proceedings during the last three years would have been a nullity and time wasted, the trial court placed itself in a position where it had to over-rule the application for stay or cast aside three years of costly litigation. Even so, the court should have protected Colonel Potts. Appellant is not unaware of the decision in *Glick* v. *Wade*, 206 Ark. 8, 172 S.W. (2d) 929, by Chief Justice Smith, in which he modifies the holding in the Haulcroft case. We note also the concurring opinion by Justice McFaddin, in which he concurs in the result but by different reasoning, and states that, in his opinion, the rights of the serviceman are protected, because he can proceed under the Act after his service ends. To the same effect, see *Martin* v. *Rolfe*, 207 Ark. 1072, 184 S.W. (2d) 70. But under the decision in either case, the trial court clearly abused its discretion.

In *Boone* v. *Lightner*, 319 U.S. 561, 63 S. Ct. 1223, (quoting from the syllabus) it is said:

> "In determining right to stay proceeding against defendant in military ser-

> vice, absence when one's rights or liabilities are being adjudged is usually *prima facie prejudicial*, but absence may be a policy, instead of the result of military service, and discretion is vested in courts to see that immunities of the Soldiers' and Sailors' Civil Relief Act are not put to such unworthy use."

In the Boone case, the defendant was a "trustee-lawyer" holding $15,000.00 in trust and had refused to account for the money, when called upon to do so, he filed an affidavit of military service stating that "he expected soon to be called to service and would be unable to try the case and asked a continuance in order to give defendant ample time to employ other counsel". The trial court found that defendant "is not upon the motion for continuance acting in good faith". It found further "It is apparent that he has only sought to use the provisions of the Soldiers' and Sailors' Civil Relief Act as a shield for his wrong doing, and this Court, who once wore a U. S. uniform with pride does not intend for this to be done". The United States Supreme Court in reviewing the case said:

> "The final question is whether the evidence sufficiently supports the opinion or whether the order constitutes an abuse of discretion."

The court leaned heavily upon the fact that defendant was a "lawyer-trustee", was guilty of

wrong-doing, that he appeared in court on the matter with counsel and plead military service even before he was called to duty, when "he expected" to be called, he asked for a continuance upon the ground that "counsel then acting for him was expecting to be called immediately into military service, and it would be necessary for defendant to procure additional counsel". Under these circumstances, the United States Supreme Court held that the trial court did not abuse its discretion, but stated:

> "The court was dealing not only with an individual but with a trustee, one charged with default in his duty, and with a fund which was said to be in jeopardy. *Defendant in spite of military service in Washington was continuing to administer the fund*" (italics ours).

In other words the "lawyer-trustee's" military service did not interfere with his administration of a $15,000.00 fund, but his military service did "interfere" when he was called upon to account. Under these circumstances, the trial court properly exercised its discretion in refusing to grant a stay of the action. Even so, Justice Black dissented and said:

> "The Court emphasizes that Boone is a member of the bar. But for the duration of the war, he is primarily a soldier with a job to do which Congress intended should over-shadow personal interests,

whether his, or those of others who seek a personal judgment against him. It is difficult for me to believe that he could adequately have prepared for this trial without a leave of many weeks. The purpose of the Act is to prevent soldiers and sailors from being harrassed by civil litigation 'in order to enable such persons to devote their entire energy to the defense needs of the nation'. He is required to devote himself to serious business, and should not be asked either to attempt to convince his superior officers of the importance of his private affairs or to spend his time hunting for lawyers.

The trial court should, at the very least, have inquired of the appropriate military authorities whether the petitioner could be granted ample leave to prepare his defense and be present for trial. If the Act does not require this, it serves little purpose. It may be argued that this petitioner, a man of knowledge and experience, is as competent to ask his superior officer for leave as is the trial court; but the argument fails because the policy set here, no matter how many qualifications the Court tries to work into it, will shoot far beyond the confines of this case. In the course of the war, numerous actions will be brought against soldiers who have never heard of this Act and have no notion that this Court might want them to apply to their superior officers for leave and to make and file a formal record of their superior officers' refusal."

The decision in *Lankford* v. *Milhollin*, 28 S.E. (2d) 752 (Ga.) 1944, involved the matter of a stay under the Soldiers' and Sailors' Relief Act in a *partition* suit. It was said in that case (quoting from the syllabus):

> "Under Soldiers 'and Sailors' Civil Relief Act, person is entitled to stay of proceeding by or against him upon his bare application showing that he is in military service, unless it appears that his ability to prosecute or defend is not materially impaired.—S. & S. Civ. Relief Act of 1940, Sections 100, 201, 50 U.S.C.A. Appendix, Sections 510, 521.
>
> Under Soldiers' and Sailors' Civil Relief Act, Court must exercise discretion as to whether there is material impairment of ability to prosecute or defend, but Court's conclusion can not rest upon conjecture.
>
> Refusal to grant continuance as to two of plaintiffs, who were in the Army, of cross-action seeking partition of land by sale was error where evidence did not show that their ability to defend such cross-action would not be materially impaired by reason of their military service.
>
> In determining right to continuance of cross-action for partition of land by sale because of absence in military service of two of plaintiffs, *their financial ability, and possibility that if present they could*

arrange for loan so as to become bidders at sale, could be considered (italics ours).

On motion for continuance of cross-action seeking partition of land by sale, because of absence in the Army of two of plaintiffs, testimony as to possibility of partition in kind by agreement if such parties were present was improperly excluded."

Governed by the rule in these cases, it is apparent that the trial court abused its discretion in refusing to grant Colonel Potts a stay of the action. No party to this litigation contends that the Colonel was not acting in "Good faith" when he filed his affidavits of military service, no party contends or can contend in good faith that the Colonel was seeking only to use the Soldiers' and Sailors' Relief Act to cover up "wrong-doing", on his part, or a breach of trust. He claims that he and his two brothers own the Sheppard Island Plantation, that he owns an undivided one-third interest, and not a mere one-ninth interest as contended by appellees, that he has documentary and record evidence located at points far distant from his present station and places where he was previously stationed, to prove his claim; and, furthermore, he readily agreed to the appointment of a receiver for the property, agreed that it be rented and the funds impounded pending the day when he could return and prove his case.

In the *Lankford* v. *Milhollin* case, the Court held that these service men were entitled to a continuance, even though they did have representation by an attorney, and even though one of them was stationed nearby and had appeared personally in court several times during the trial of the case. Their attorney testified:

> "....it would be sold for whatever you—desire to pay for it; and those boys in the military service, as I see it, would be deprived of their property without even bidding on it or helping finance it, and come back and find their place sold and gone for much less than its worth. It certainly is unfair to try to partition in their absence."

Under these circumstances, appellant Colonel Adam Empie Potts respectfully submits that the trial court clearly abused its discretion.

The Trial Court Denied Colonel Adam Empie Potts Due Process of Law and Equal Protection of the Law as Guaranteed by the Fourteenth Amendment to the Constitution of the United States

It is admitted by all parties that the property in Jefferson County, Arkansas, known as Sheppard Island Plantation, the subject of this

suit, was owned by James Sheppard, Grandfather of the appellants in this cause. It is admitted also that James Sheppard Potts, Joseph Schoolfield Potts, Jr., and Colonel Adam Empie Potts are the grandchildren of said James Sheppard and that these three Potts Brothers are the only surviving descendants and are the sole heirs at law of said James Sheppard, deceased.

The will of James Sheppard, a resident of Jefferson County, Arkansas, was admitted to record in Jefferson County Court, at Pine Bluff, Arkansas, on August 8, 1870, recorded in Will Book 1, at page 274 (T.91). By said will, he provided for disposition of his Arkansas property, Sheppard Island Place, as follows:

> "My will and desire is that all my land and other property in the State of Arkansas be sold by my executors hereinafter named as soon after my death as they deem to the interest of my estate, and that the proceeds of sale be equally divided among my wife and children, my wife taking an equal share with each of my children so that her share shall be equal to the share of one of the children."

Two executors were named, Benj. F. Richardson for Arkansas property, and Peter W. Grubbs, of Richmond, Virginia, for Virginia properties; and the will further provided that:

"My two executors are to unite and concur in the sale of my property in the State of Arkansas."

The record shows upon its face that said executors did not concur and unite in a sale as directed in the will, the record does show that they made no attempt to comply with the terms of the will, it shows upon its face that one executor, Benj. F. Richardson, made an attempt to quitclaim his interest to the heirs of the testator and "doth hereby turn over the possession and control of the above described real property (which was not described) situated in Arkansas, belonging to the Estate of the late James Shepherd, dec'd unto the said Annie E. Shepherd, A. Empy Shepherd, Belle G. Shepherd, Katie E. Shepherd, Jr., and Katie E. Shepherd, Sr., who are the devisees and heirs of the late James Shepherd, dec'd." (T.138, 139).

Appellant Colonel Adam Empie Potts, set up in his answer to the partition suit that he and his two brothers are the owners of the Arkansas properties, and he reasons that the co-executors of his grandfather's will never executed the trust which directed them to "unite and concur" in the sale of the Arkansas property and to divide the proceeds, that this trust was personal to them and that their death terminated the trust and, therefore, the legacy lapsed; that the instrument

Richardson executed is void, thereby vesting a life estate only in Annie E. Sheppard, A. Empie Sheppard, Belle G. Sheppard, Katie E. Sheppard, Jr., and Katie E. Sheppard, Sr. That these life tenants are dead, and since appellant and his two brothers are the only three living lineal descendants and heirs of their grandfather, James Sheppard, that they now own the Arkansas properties. Appellant Colonel Adam Empie Potts contends that he has writings and records in his possession and in storage to prove that his contentions are correct, that the heirs had an agreement as to the operation and division of proceeds of the Arkansas properties, that he would produce said writings and records and prove that he and his two brothers own the Arkansas properties, but that his military service prevents and has prevented him from so doing, that the writings and records necessary to prove his case are inaccessible to his two brothers not in the military service, that it is not possible for his two brothers adequately to prove *his case* or *their case*, due to his active service in the United States Army.

Colonel Potts attempted to preserve his rights under the Soldiers' and Sailors' Relief Acts of 1940 at every stage of the proceeding as far as his military service would permit.

The first suggestion of military service of Colonel Potts was made by his brother, James Sheppard Potts, in a deposition taken at Richmond, Virginia, on April 17, 1942 (T.256 ffl.), Said testimony is as follows:

"A. Adam Empie Potts and Joseph Schoolfield Potts, Jr., are my two brothers and equally interested in any benefits to be received from the estate of our grandfather, James Sheppard. May I state at this time—it may be necessary to put it in the deposition—that Adam Empie Potts is now a Colonel or Brigadier General, serving with the armed forces at Honolulu in Hawaii and is not able to be present, although he has filed an answer in this case.

MR. FLIPPEN:

I would like to request if any consent of court has been obtained for proceeding in the absence of Adam Empie Potts in military service.

THE WITNESS:

Not that I know of; nothing that I know of to that effect.

MR. STONE:

Mr. Flippen has just anticipated me.

THE WITNESS:

In fact, I know they haven't gotten any consent.

MR. FLIPPEN:

I would like the record to show that we are not waiving any objection we have to the proceeding here today and to the filing of the depositions or any part thereof.

MR. STONE:

Does Mr. Wickham desire to make any statement in the record?

MR. WICKHAM:

I, of course, reserve any right we may have.

MR. STONE:

Counsel for James Sheppard Potts desires to state to the Court that the evidence is that Adam Empie Potts, who is a party to this suit and who has filed an answer, which answer in-

dicates on the face thereof that he is also a necessary witness to enable the Court to determine the merits of this cause, is in the armed service of the United States Government. The records of the Court in this cause apparently do not show that there either has been a peremptory order by the Court or any consent by Adam Empie Potts dispensing with any provisions of what is colloquially known as the Soldiers' and Sailors' Act and the stay of proceedings thereunder. For this reason counsel desires to state to the Court that he is proceeding with the deposition taken this day subject to any ruling of the Court as to the propriety of taking depositions under said circumstances and the legal effect thereof.

Q. Mr. Potts, to your own knowledge is there in the possession of Adam Empie Potts any evidence, documentary or otherwise, that would be pertinent to these proceedings and helpful to the court in the determination of this cause?

A. I believe and am positive that there is considerable information and consid-

> erable data and other records in his possession which he would like to bring before the Court and which are very necessary to protect his interest in this cause."

Colonel Potts was not represented by counsel in the case, as shown by the testimony (T. 272).

The deposition of Louis S. Herrink was taken on behalf of the plaintiffs at Richmond, Virginia, on the 9th day of October, 1942, and appellant Colonel Adam Empie Potts objected as follows:

> "James Sheppard Potts, Counsel for Adam Empie Potts, objects to the taking of these depositions and to any proceedings being held in this matter in Jefferson Chancery Court, State of Arkansas, due to the fact that said Adam Empie Potts, is now a Colonel, or Brigadier General, in the armed forces of the United States of America, and is assigned to active duty and unable to protect his interest and is unwilling that these proceedings be carried on further and objects to same until after the duration of the present war and military emergency in conformity with the Soldier's and Sailor's Re-

lief Act of 1940, passed by the Congress of the United States."

On June 11, 1947, J. S. Potts, Jr., addressed a letter to A. F. Triplett, which reads in part as follows:

"Dear Mr. Triplett:

SUBJECT: *Sheppard Island Plantation*

I wish to thank you for your letter of May 24th, indicating an intention on the part of the Chancery Court to enter a decree for partition of the above property, and I am surprised that the Court would appear to disregard protest made by Colonel A. E. Potts under the Federal Soldiers' and Sailors' Civil Relief Act, which is controlling at this time. Further, I wish to be on record as concurring with Colonel Potts, as he is entitled to an opportunity to handle his own affairs, which, of course, is the reason for the above Civil Relief Act."

Appellant, Colonel Adam Empie Potts, in October, 1947, caused to be published in the newspapers of Jefferson County and in public places the following notice:

"NOTICE"

"To all bidders or intended purchasers of the lands known as SHEPPARD ISLAND PLANTATION, located in Jefferson County, Arkansas, and advertised for sale by auction at the Court House, Pine Bluff, Arkansas, under decree of the Chancery Court of Jefferson County, Arkansas, in the case of *J. K. Rader, Administrator* v. *James Sheppard Potts, et al,* TAKE NOTICE:

That, Colonel Adam E. Potts, Coast Artillery Corps, United States Army, a joint owner of SHEPPARD ISLAND PLANTATION, is on active military service with the Armed Forces of the United States and unable to be present to protect his rights at this sale:

That he claims his interests are materially affected by the terms of the aforesaid decree ordering this sale, and:

That as a result of which he invokes his right of protection under Section 200 (4), Article II of Public Law No. 861, 76th Congress, 1940—(Soldiers' and Sailors' Civil Relief Act), reserving unto himself the right to reopen this case within 90 days after termination of his active military service; and therefore, that pursuant to the above, the title to this property

which might be conveyed under said sale is impaired and no bidder can be a bona fide purchaser for value under said decree."

On October 17, 1947, after a sale had been ordered, testimony was taken upon exceptions to the order of sale and James Sheppard Potts testified that Colonel Adam Empie Potts was in the Coast Artillery at that time, stationed at Ft. Winfield Scott, California, that he was in the Army of the United States in 1937, when this action was filed, that he had been on continuous active duty since that time, a large part of the time in foreign service in Honolulu, Hawaii, remained overseas in Honolulu until 1943, where he was commanding officer of an Anti-aircraft unit at Schofield Barracks, he was there at the time of Jap raid on December 7, 1941, fired the first shot at the Japs and is credited with shooting down the first Jap plane of the war. He testified further that Colonel Adam Empie Potts has records in storage, inaccessible to him, necessary to their defense of this case (S.T.9-20).

Joseph Schoolfield Potts testified and verified and corroborated the testimony of James Sheppard Potts, that he had been in the military service himself and knew that Colonel Potts had been kept very busy attending to his military duties, that he personally knew that Colonel Potts

could not look after his interests in Arkansas, due to his military service (S.T.21-25).

The above and foregoing is all of the pleadings and testimony in the record in regard to the military service of Colonel Potts and the testimony of witnesses to the effect that he could not and cannot adequately present his defense and protect his rights, due to his active service in the United States Army. Colonel Potts' own affidavit of military service properly verified that his rights in this law suit are being prejudiced, due to his military service, is undisputed.

The refusal of the trial court to grant a stay under these circumstances is tantamount to a refusal to permit Colonel Potts to defend his title to said property and is a denial of due process and equal protection of the law.

Attorneys for Appellant have not attempted to point out defenses of Colonel Potts to the partition suit in detail, nor to point to errors of the trial court in ordering a sale of the property, nor to errors in procedure, for the reason that Colonel Potts firmly believes that the Soldiers' and Sailors' Relief Act should adequately protect him during his military service and that his right to defend will be reserved to him until he can be present; therefore, attorneys for appellant have confined this brief to a statement of his rights

under the Soldiers' and Sailors' Relief Act, in accordance with his instructions.

Further, we have cited only the testimony and parts of the pleadings in this brief pertaining to the matter of "stay", on the Soldiers' and Sailors' Relief Act. A complete abstract of the pleadings and testimony is fully abstracted in the brief filed by Appellant James Sheppard Potts and is hereby adopted by reference as though set out fully herein. To abstract the record fully herein would be merely repetition and would serve no useful purpose.

CONCLUSION

Appellant submits that the trial court clearly abused its discretion in refusing to rule upon his motion for stay before ordering a sale of the property and in refusing to grant a stay, that the receiver could have continued to collect and account for all rents upon the property in controversy without prejudice to any of the parties during his military service, that this large plantation consisting mainly of farming and timber land can be partitioned in kind into either thirds or ninths as the interest of the parties may appear after trial upon the merits, that appellant should have been given an opportunity to bid at the sale (if or when a sale had become neces-

sary), that appellant filed his "Motion for Stay" by reason of military service in good faith and not for purposes of delay, that his motion should have been granted, that the trial court's refusal to grant a stay is a denial of due process and equal protection of the law as guaranteed to him by the Constitution of the State of Arkansas and by the Fourteenth Amendment of the Constitution of the United States of America.

Wherefore, appellant, Colonel Adam Empie Potts, prays that this cause be reversed and remanded with directions to set aside the "Order of Sale", to strike all proceedings subsequent to his answer, and that he be permitted personally to present his defense, and to have his day in court, for costs and all proper relief.

W. H. GLOVER

CARL LANGSTON

JAMES SHEPPARD POTTS

Attorneys for Appellant